

A **BANK PERTANIAN MALAYSIA BHD**

v.

MCI BIO TECH SDN BHD

B COURT OF APPEAL, PUTRAJAYA
SYED AHMAD HELMY JCA
ABDUL WAHAB PATAIL JCA
ABDUL AZIZ RAHIM JCA
[CIVIL APPEAL NO: B-02-2649-10-2011]
C 12 JUNE 2013

BANKING: *Banker and customer - Loan agreement - Breach - Bank refused last draw down of loan facility - Non-compliance of condition precedent - Whether bank waived rights in allowing previous draw downs - Whether bank's termination notice defective - Whether 14 days requisite time given to borrower to remedy breach - Whether mutual agreement to restore non-compliance necessary - Whether loss of profits and loss of value of company could be recovered*

CIVIL PROCEDURE: *Appeal - Appeal against judgment of High Court - Whether assessment by High Court correct - Whether appellate jurisdiction to be exercised to remedy injustice arising from errors - Whether interference based solely because appellate judges had different views - Whether unwarranted - Whether assessment by High Court given due weight*

F The appellant ('bank') had issued a final letter of offer for the grant of a loan on 11 July 2003 and had released the funds to the respondents ('MCI'). After the release of the funds, MCI commenced with their project. Subsequently, an additional loan and documentation in relation to this was executed on 30 November 2007. Then, the bank confirmed that MCI could receive the additional loan fund from the bank's branch in Banting. However, in mid-August 2006, the bank sought allocation without cost of 30% equity in MCI but MCI refused to comply. On 29 April 2006, the bank issued a letter informing MCI that cl. 28(d) of the letter of offer which was amended to add in that 30% bumiputera investor was required to be added into the companies' share holding before the first withdrawal of the loan could be done. MCI accepted the amendment since it had already commenced works and incurred costs for the loan. On 14 February 2008, the bank issued a letter and informed MCI

that the loan application could not be considered and requested MCI to contact the relevant government departments to obtain a separate title for the five lots of land that was purchased. The bank had given a period of four months to MCI to comply with the transfer of title and to charge the said lands to the bank before the loan could be released. However, after certain meetings and transfer of account to Kuala Lumpur, the loan funds was released. On 30 March 2009 MCI applied for the release of the sixth tranche of RM3,000,000 but the bank informed MCI that although the application was approved, it was subject to the approval of other departments. MCI had given various reminders for the release of the funds but to no avail. MCI sought general damages and special damages for the delays that was caused by the bank in releasing the loan funds. The bank counter claimed and asserted that MCI had breached the bank's condition precedent and committed an event of default for using the loan for a different purpose. Therefore, the bank had recalled the loan facility granted and demanded the amount of RM15,944,642.40 owed with interests. The bank appealed against the decision of the High Court, which had allowed MCI's claim, and had dismissed the bank's counter claim. The bank submitted that the High Court had erred when it held that the bank was not justified to withhold the release of the final draw down sum of RM3,000,000 on the ground that MCI had not fulfilled the condition precedent. The High Court held that because the bank had previously disbursed RM15,000,000 to MCI without the issue of non-fulfilment of the condition precedent pursuant to s. 11.1 of the loan agreement, the bank had waived their rights. The bank relied on cl. 6.3 of the loan agreement which provided that any waiver shall not preclude the bank from insisting on MCI's compliance with such waived or varied terms and conditions. The bank further appealed against the High Court's decision and the issues that arose were *inter alia* that: (i) the termination notice issued by the bank's solicitors was defective as it failed to specify that the condition precedent were not fulfilled; (ii) the bank failed to give MCI the requisite 14 days to remedy the breach of condition precedent; and (iii) the High Court had erred when it awarded MCI damages for loss of profits and loss of value of the company.

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A Held (dismissing appeal)**Per Abdul Wahab Patail JCA delivering the judgment of the court:**

- B** (1) The function of cl. 6.3 of the loan agreement was that no mutual agreement to restore any non-compliance was necessary. The High Court when examining the bank's conduct bore in mind that the amended letter of offer to add a new provision when MCI had already committed itself to the project and that a notice for the sixth draw down was made before the refusal. Therefore, the High Court had not erred when it did not consider cl. 6.3 as it did not appear that the bank relied on cl. 6.3. (paras 17 & 18)
- C**
- D** (2) At the time the draw down was sought of the last tranche, no notice had been issued pursuant to s. 11.1 of the loan agreement. Hence, the reliance upon the ground of default was an afterthought, particularly since the officers had inspected, recommended release of funds and then approved the payment. The High Court had correctly directed itself that the role of the bank's chairman was not the issue and the question was whether the bank was justified in withholding the release of the sixth draw down of RM3,000,000. The High Court had correctly addressed the departure in the use of funds. There was no reason to hold any error in the reasoning of the High Court that warranted appellate intervention. (paras 23-26)
- E**
- F**
- G** (3) The letter of demand from the bank's solicitors did not specify that the condition precedent had not been complied with but this point was not the sole force for the High Court's decision. Notices to provide documents to determine whether MCI had complied with the original purpose of the loan facilities were far different from a notice to rectify which spelled out the non-compliance and gave the agreed time to rectify. Since the bank had failed to demonstrate that the High Court had erred in law and in fact resulting in an injustice warranting the appellate intervention to remedy, the appeal against liability was dismissed. (paras 27, 29, 36 & 39)
- H**
- I** (4) The assessment of the court of original jurisdiction must be given due weight so that the appellate jurisdiction was seen to be exercised only to remedy injustice which arose from errors

and not interference based solely on the appellate judges that had different views. Otherwise the appeal would be a second bite of the cherry by anyone who was not happy with the decision of a court of original jurisdiction. (para 11)

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- (5) If loss of profit had been recovered, an award for loss of value of the company would clearly be a duplication. Therefore, the appellate court had set aside the order of damages and the damages was to be assessed. The dispute was the sixth tranche of RM3,000,000 and there was no dispute in the earlier five tranches which had been paid. Therefore, the amount of RM15,944,642.40 as counter claimed by the bank should be set off against damages to be assessed. (paras 41-44)

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Bahasa Malaysia Translation Of Headnotes

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Pihak perayu ('bank') telah mengeluarkan satu surat tawaran terakhir meluluskan permohonan pinjaman pada 11 Julai 2003 dan telah mengeluarkan dana tersebut kepada responden ('MCI'). Setelah dana diperolehi, MCI telah memulakan kerja-kerja projek mereka. Kemudian, MCI telah membuat pinjaman tambahan dan dokumentasi yang berkenaan telah dimeterai pada 30 November 2007. Pihak bank telah mengesahkan bahawa MCI akan memperolehi dana untuk pinjaman tambahan tersebut dari cawangan bank di Banting. Pada sekitar pertengahan bulan Ogos 2006, pihak bank telah memohon peruntukan kos tanpa ekuiti sebanyak 30% daripada MCI tetapi MCI enggan mematuhi kehendak pihak bank. Pada 29 April 2006, pihak bank telah mengeluarkan satu surat yang memaklumkan bahawa kl. 28(d) pada surat tawaran telah dipinda dan penyertaan bumiputera sebanyak 30% dalam pegangan saham syarikat hendaklah dilaksanakan sebelum pengeluaran pertama wang pinjaman dilakukan. Pihak MCI telah menerima peruntukan pindaan tersebut kerana mereka telah pun memulakan kerja-kerja dan telah menanggung kos untuk pinjaman. Pada 14 Februari 2008, pihak bank telah mengeluarkan satu surat yang memaklumkan kepada MCI bahawa permohonan pinjaman tidak dapat dipertimbangkan dan meminta MCI menghubungi pihak berkenaan untuk mendapatkan hak milik berasingan bagi lima lot tanah yang dibeli. Pihak bank telah memberi MCI tempoh empat bulan untuk menguruskan pindah milik dan menggadaikan lot tanah tersebut ke atas nama bank sebelum pinjaman tersebut boleh dilepaskan. Walau bagaimanapun,

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- A setelah beberapa perjumpaan dan pindahan akaun ke Kuala Lumpur, wang pinjaman tersebut telah dilepaskan. Pada 30 Mac 2009, pihak MCI telah memohon untuk pelepasan transaksi pinjaman keenam berjumlah RM3,000,000 tetapi pihak bank telah memaklumkan kepada MCI bahawa walaupun permohonan tranche
- B keenam telah diluluskan tetapi ia masih tertakluk kepada kelulusan bahagian yang lain. Pihak MCI telah memberikan pelbagai peringatan untuk pelepasan wang tersebut tetapi tidak berjaya. Pihak MCI telah menuntut kerugian dan kerosakan khas untuk kelewatan yang disebabkan oleh pihak bank dalam melepaskan
- C bayaran wang pinjaman tersebut. Pihak bank telah membuat tuntutan balas dan menegaskan bahawa MCI telah gagal memenuhi syarat terdahulu kemudahan pinjaman dan melakukan kemungkiran kerana menggunakan wang pinjaman selain daripada tujuan yang terkandung dalam perjanjian. Oleh itu, kemudahan
- D pinjaman tersebut terpaksa ditarik balik dan telah menuntut jumlah keseluruhan yang terhutang sebanyak RM15,944,642.40 berserta faedah. Pihak bank telah membuat rayuan terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan MCI dan menolak tuntutan balas pihak bank. Pihak bank telah berhujah bahawa
- E Mahkamah Tinggi telah terkhilaf apabila memutuskan bahawa pihak bank tidak mempunyai justifikasi untuk menahan pelepasan wang pinjaman terakhir sebanyak RM3,000,000 atas alasan bahawa MCI tidak memenuhi syarat terdahulu. Mahkamah Tinggi telah memutuskan bahawa, oleh kerana pihak bank telah mengeluarkan
- F RM15,000,000 kepada MCI tanpa membangkitkan isu kegagalan untuk mematuhi syarat terdahulu, maka berdasarkan kl. 11.1 perjanjian pinjaman, pihak bank telah melepaskan hak mereka. Pihak bank telah bergantung kepada kl. 6.3 perjanjian pinjaman yang menyatakan bahawa sebarang pelepasan hak tidak
- G menghalang pihak bank untuk memastikan pihak MCI mematuhi terma-terma dan syarat-syarat yang telah dikecualikan atau diubah. Pihak bank juga menegaskan bahawa MCI telah gagal untuk membuat ansuran pembayaran balik pinjaman tersebut. Pihak bank telah merayu terhadap keputusan Mahkamah Tinggi dan
- H membangkitkan isu-isu, antara lain: (i) bahawa notis penamatan yang dikeluarkan oleh pihak bank adalah cacat kerana tidak menyatakan bahawa syarat terdahulu gagal dipatuhi; (ii) bahawa pihak bank gagal memberikan tempoh 14 hari kepada MCI untuk membetulkan kegagalan mereka untuk memenuhi syarat terdahulu;
- I dan (iii) bahawa Mahkamah Tinggi telah terkhilaf apabila mengawardkan MCI ganti rugi bagi kerugian keuntungan dan kerugian nilai syarikat.

Diputuskan (menolak rayuan):

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Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

- (1) Fungsi kl. 6.3 dalam perjanjian pinjaman adalah bahawa tidak ada persetujuan bersama yang diperlukan untuk mengembalikan apa-apa ketidakpatuhan. Mahkamah Tinggi apabila memeriksa kelakuan pihak bank telah mempertimbangkan bahawa surat tawaran yang telah dipinda untuk menambahkan peruntukan yang baru dibuat apabila MCI telah pun memulakan projek dan notis untuk pengeluaran pinjaman keenam telah dibuat sebelum keengganan tersebut. Oleh itu, Mahkamah Tinggi tidak terkhilaf apabila gagal mempertimbangkan kl. 6.3 memandangkan pihak bank tidak bergantung kepada kl. 6.3. B C
- (2) Apabila pengeluaran tranche terakhir dipohon, tiada sebarang notis yang telah dikeluarkan berdasarkan s. 11.1 perjanjian pinjaman. Oleh itu, kebergantungan berdasarkan alasan kemungkiran pembayaran adalah fikiran semula, terutamanya apabila pegawai bank telah memeriksa, mengesyorkan kelulusan pembayaran wang pinjaman dan meluluskan pembayaran. Mahkamah Tinggi telah dengan betul mengarahkan dirinya bahawa fungsi pengerusi bank tidak menjadi isu dan persoalannya adalah sama ada kelakuan pihak bank wajar dalam menahan pelepasan pengeluaran keenam bernilai RM3,000,000. Mahkamah Tinggi telah dengan betul menilai penyimpangan dalam penggunaan dana. Tiada sebarang sebab untuk menyatakan bahawa Mahkamah Tinggi telah terkhilaf dalam keputusannya yang mewajarkan campur tangan Mahkamah Rayuan. D E F
- (3) Surat tuntutan daripada peguamcara bank tidak menyatakan bahawa syarat terdahulu gagal dipatuhi, tetapi, perkara ini tidak menjadi isu tunggal untuk keputusan Mahkamah Tinggi. Notis-notis untuk menyediakan dokumen untuk menentukan sama ada MCI telah mematuhi tujuan asal kemudahan pinjaman adalah jauh berbeza daripada notis pembetulan yang menyatakan tentang ketidakpatuhan dan memberikan tempoh masa yang dipersetujui untuk pembetulan. Memandangkan pihak bank gagal menunjukkan bahawa Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta yang mengakibatkan ketidakadilan yang mewajarkan campur tangan Mahkamah Rayuan, rayuan terhadap liabiliti adalah ditolak. G H I

- A (4) Analisa mahkamah terhadap bidang kuasa asalnya harus diberi pertimbangan yang sewajarnya agar bidang kuasa Mahkamah Rayuan digunakan hanya untuk meremedikan ketidakadilan yang timbul akibat kekhilafan dan bukanlah untuk campur tangan semata-mata kerana hakim-hakim rayuan mempunyai pandangan yang berbeza. Jika tidak, rayuan akan bermaksud memberikan peluang kedua kepada sesiapa yang tidak berpuas hati dengan keputusan mahkamah.
- B
- C (5) Jika kerugian keuntungan boleh dituntut, award bagi kerugian nilai syarikat adalah jelas suatu penduaan. Mahkamah Rayuan telah mengenyepikan perintah ganti rugi dan mengarahkan agar ganti rugi ditafsirkan semula. Pertikaianya adalah mengenai tranche keenam sebanyak RM3,000,000 dan tiada sebarang pertikaian mengenai lima tranche yang telah pun dibayar. Oleh itu, tuntutan balas sejumlah RM15,944,642.40 daripada pihak bank perlu ditolak daripada ganti rugi yang akan ditafsir.
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Case(s) referred to:

Bank Bumiputra Malaysia Bhd v. Sal Enterprise Sdn Bhd & Ors [2005] 4 CLJ 277 CA (*refd*)

- E *Benmax v. Austin Motor Co Ltd* [1955] 1 All ER 326 (*refd*)
British & Benningtons Ltd v. NW Cachar Tea Co [1923] AC 48 (*refd*)
Pasuma Pharmacal Corp v. McAlister & Co Ltd [1964] 1 LNS 131 FC (*refd*)
Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] 1 LNS 202 HC (*refd*)
- F
- For the appellant - DP Naban (Kumar Kanagasingam, Choo Dee Wei & Mak Hon Pan with him); M/s Lee Hishammuddin Allen & Gledhill
For the respondent - M Pathmanathan (Shirin Pathmanathan with him); M/s Chan Leong & Co

- G [Appeal from High Court, Shah Alam; Civil Suit No: 22-362-2010]
Reported by Sandra Gabriel

H **JUDGMENT**

Abdul Wahab Patail JCA:

- I [1] Bank Pertanian Malaysia Bhd (the bank) filed a notice of appeal as follows:

terhadap keseluruhan keputusan Mahkamah Tinggi Shah Alam yang membenarkan tuntutan Plaintiff ke atas Defendan dan juga menolak tuntutan balas Defendan ke atas Plaintiff dengan kos.

[2] The respondent MCI Bio Tech Sdn Bhd (MCI) had sought the following orders against the bank: **A**

(a) Kerugian dan kerosakan khas semasa tempoh kelewatan 16 bulan pertama sebanyak RM300,000;

(b) Kerugian dan kerosakan khas selama tempoh kelewatan semasa pengeluaran pinjaman projek dan juga semasa tempoh kelewatan 11 bulan pertama dalam jumlah berikut: **B**

(i) RM725,998.58;

(ii) RM130,000 setakat 1 Mac 2010 dan masih berterusan; dan **C**

(iii) RM310,000 setakat 31 Disember 2008 dan masih berterusan. **D**

(c) Kerugian dan kerosakkan am seperti yang ditaksir;

(d) Kerugian dan kerosakan “aggravated”;

(e) Faedah dan kos-kos tindakan ini; dan **E**

(f) Relif dan perintah selanjutnya yang dianggap adil dan munasabah oleh mahkamah yang mulia ini.

[3] The cause of action relied upon was breach of its responsibilities as the lender. **F**

[4] It was pleaded:

(a) The bank had issued a letter of offer dated 19 October 2005 (see RR2:364). **G**

(b) Due to changes, a final letter of offer was issued on 11 July 2006.

(c) Documents prepared by the solicitors for the bank were executed by MCI and was stamped 30 August 2006. **H**

(d) On or about 28 September 2006, MCI received a letter from the solicitors for the bank confirming all documentation was completed and in order for the bank to release the funds.

(e) On or 13 October 2006, the bank confirmed the plaintiff could contact their Banting branch to collect the funds, and issued “Notis Pengeluaran Pinjaman Projek Pertama”. **I**

- A** (f) MCI commenced with proceeding with the project.
- (g) There was additional loan, and documentation in relation to this was executed on 30 November 2007.
- B** (h) On or about 4 December 2007, MCI received the bank's solicitor's letter that the documentation for the additional loan was completed and in order to allow the bank to issue the funds.
- C** (i) On or about 10 December 2007, the bank confirmed that MCI could go to its Banting branch for the funds.
- (j) Sometime mid-August 2006, the bank sought allocation without cost of 30% equity in MCI. MCI refused.
- D** (k) On 29 August 2006, the bank issued a letter that cl. 28(d) of the letter of offer was amended to read:
- Penyertaan bumiputera sebanyak 30% dalam pegangan saham syarikat hendaklah dilaksanakan sebelum pengeluaran pertama wang pinjaman dilakukan.
- E** (l) MCI accepted the amendment, as it explained in the pleading:
- (i) Perjanjian untuk jual-beli keseluruhan hasil pengeluaran Projek Peptide Protein telah pun dicapai semenjak 28 November 2005 dengan agensi luar negeri melalui syarikat pemasaran plaintif, MCI Bio-Peptide Sdn Bhd;
- F** (ii) Pakar-pakar asing telah pun sampai dari luar negeri siap-sedia untuk menjalankan kerja-kerja memulakan Projek Peptide Protein; dan
- G** (iii) Plaintif telah pun membiayai dan/atau dikenakan bayaran fee pemerosesan pinjaman projek sebanyak RM5,000 dan fee guaman sebanyak RM161,114. kepada defendan dan peguamcara defendan masing-masing.
- H** (m) On or about various issues were raised against bumiputera investors brought forward by MCI to delay release of fund.

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- (n) On 14 February 2008, and contrary to para. 9.2 of the letter of offer and cl. 5.1(ii) of the loan agreement, the bank issued a letter with the following: A

Adalah dimaklumkan setelah semakan dan penelitian ke atas dokumen-dokumen pinjaman tuan, kami berpendapat bahawa permohonan pengeluaran wang pinjaman tuan tidak dapat dipertimbangkan. Pihak tuan dikehendaki membuat susulan dengan pihak Pejabat Tanah Sepang, Lembaga Ukur dan Pejabat Tanah dan Galian Negeri Selangor untuk mendapatkan hakmilik berasingan bagi 5 lot tanah yang dibeli dengan kadar segera. B

Pihak Bank memberi tempoh 4 bulan dari tarikh surat ini untuk menguruskan pindahmilik ke atas nama syarikat tuan dan seterusnya gadaian ke atas nama Bank Pertanian Malaysia. Kami akan hanya mengeluarkan wang pinjaman setelah kedua-dua perkara di atas disempurnakan. C

- (o) After meetings with the General Manager and Head of the Credit Department, the account was transferred to Kuala Lumpur and the loan funds were released. D

- (p) On 30 March 2009, MCI applied for release of the sixth tranche, the bank had told MCI that it was approved “tetapi masih tertakluk kepada kelulusan bahagian lain yang merupakan prosedur baru.” E

- (q) MCI had given various reminders for the release of funds but to date of the filing of the claim (18 March 2010), the funds had not been released. F

[5] The key parts of the assertions by MCI in support of liability were denied by the bank, and MCI was put to strict proof.

[6] Putting a party to strict proof does not affect the standard of proof, which in civil claims, is proof upon balance of probabilities. G

[7] The bank counterclaimed. It was asserted that MCI breached conditions precedent: H

30. Defendan mengatakan bahawa pada setiap masa yang material, Plaintiff telah gagal memenuhi syarat terdahulu kemudahan pinjaman tersebut yang dikehendaki di bawah perjanjian tersebut, maka pengeluaran Pinjaman Berjangka I

A (Dana TIKS2) yang berjumlah RM3,000,000.00 tidak dapat dilakukan. Malahan atas kegagalan Plaintiff memenuhi syarat terdahulu pengeluaran Kemudahan Pinjaman tersebut terpaksa ditarik balik menurut klausa 6.2 Perjanjian Pinjaman tersebut

B 31. Melalui satu notis tuntutan daripada peguamcaranya bertarikh 2-6-2010, Defendan telah menarik balik Kemudahan Pinjaman tersebut dan menuntut jumlah keseluruhan yang terhutang setakat 30-4-2010 RM15,944,642.40 berserta faedah daripada Plaintiff.

C **Appeals Generally**

[8] This court was informed, relying on *Benmax v. Austin Motor Co Ltd* [1955] 1 All ER 326 HL and *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] 1 LNS 202; [1964] MLJ 87 PC, that it is in as good a position to evaluate the evidence and to draw inferences since the case does not involve credibility of witnesses.

[9] However, we caution ourselves that these authorities do not alter the nature of appellate jurisdiction. We remind ourselves that an appeal court does not possess original jurisdiction in the matter. That original jurisdiction is given by law to the High Court. Only where it is demonstrated that the court of original jurisdiction has:

(a) erred in law, principle, fact relied upon or in appreciation of the facts; and

(b) so erred that injustice is caused,

only then does the appellate jurisdiction arise for the appellate court to intervene and exercise the powers of the court of original jurisdiction to remedy the injustice.

[10] We recognise that from a given set of facts as often as not more than one inference may be drawn. There are various reasons including the fact that some facts may warrant being given more weight than others depending upon the particular circumstances of a case. Justice is not whitewash painted in broad strokes.

[11] That being the case, the assessment of the court of original jurisdiction must be given due weight so that appellate jurisdiction is seen to be exercised purely to remedy injustices arising from errors, and not interference based solely on the appellate judges having a different view. Otherwise, the appeals become merely a second bite of the cherry by anyone who is for any reason not happy with the decision of a court of original jurisdiction.

[12] We, therefore, proceed to examine the grounds of judgment in the light of the submissions for the appellant. A

Grounds Of Judgment And Submission Thereon

[13] The High Court had first examined the loan agreement, and considered cls. 13 and 16, and took cognizance of cl. 6.1 as to conditions precedent before proceeding to consider the dispute. B

[14] Adopting the summation by counsel before us for the bank, it was submitted that the High Court erred in holding that the bank was not justified to withhold the release of the final drawdown for the sum of RM3 million on the following grounds: C

(a) The contention by the appellant/defendant that the respondent/plaintiff did not fulfil the conditions precedent by using the monies disbursed contrary to the intended purpose under the loan agreement was not tenable because: D

(i) The appellant/defendant had previously disbursed a sum of RM15 million to the respondent/plaintiff pursuant to six drawdown notices without raising the issue of non-fulfilment of the conditions precedent and thus waived their rights; E

(ii) The evidence of witnesses and the contemporaneous documents showed that the respondent/plaintiff had used the monies disbursed in a manner contrary to the intended purpose under the loan agreement; F

(iii) The termination notice dated 28 April 2010 issued by the appellant/defendant's then solicitors failed to specify the relevant conditions precedent that the respondent/plaintiff is said to have not fulfilled (termination notice defect); and G

(iv) The appellant/defendant failed to give the respondent/plaintiff the requisite 14 days to remedy the breach of the conditions precedent (notice to remedy). H

(b) The contention by the appellant/defendant that the respondent/plaintiff had failed to pay their monthly instalments in a timely manner was untenable because the appellant/defendant had failed to adduce any evidence to support the contention. I

- A (c) The contention by the appellant/defendant that the
respondent/plaintiff had failed to place the fixed deposits as
security as required under the loan facilities was untenable
because the failure of the respondent/plaintiff to place the fixed
deposits was a direct consequence of the appellant/defendant's
B failure in not releasing the sum of RM3 million.

Waiver

- [15] Counsel for the bank quite correctly referred to cl. 6.3 of
the agreement which provided that any waiver or variation shall
C not preclude the bank from insisting on the borrower's compliance
with such waived or varied terms and conditions. He also referred
to para. 2 of the Third Schedule that warranties and
representations remained true and correct at the time of each
advance.
D

- [16] We agree that if the bank relied upon cl. 6.3 to demand
compliance with regard to the last tranche, it was entitled to do
so. We found that the grounds of judgment did not show that the
High Court addressed its mind on cl. 6.3. Certainly, the failure
E appears to be an error. The question we must address is whether
the failure was an error and that it warrants appellate intervention
as explained earlier above.

- [17] Examination of the grounds of judgment shows that the High
F Court addressed its mind on the conduct of the parties and the
inferences that may be drawn therefrom. Now, if there had been
departures and such non-compliance had been accepted without
complaint or reservation, a party can ordinarily say the
requirement of compliance has been waived. To restore it would
G require notice and faces the argument that to restore it requires,
in the absence of a provision of giving reasonable notice, mutual
agreement. The function of cl. 6.3 is that no mutual agreement to
restore is necessary. Evidently the High Court was examining the
conduct of the bank's officers, bearing in mind, amending the letter
H of offer to add a new provision when MCI had committed itself
to the project and third parties, transfer of the account to the
Kuala Lumpur office before releases of funds was made, and that
notice for the sixth drawdown was made, before the refusal.

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[18] Considering the matter as a whole, we cannot say that the High Court erred in not considering cl. 6.3 and that it warrants appellate intervention as it does not appear that the bank and its officers were in fact relying on cl. 6.3. A

Usage Of Disbursed Funds B

[19] On this issue, the submission navigated cl. 3.1.19 that MCI warrants no event of default had occurred, cl. 11.1.20 that an event of default occurs if the borrower uses the loan for a different purpose than that stated in the agreement, and cl. 4.4 that MCI proposes or intends to use for a different purpose, written consent from the bank must be first obtained. C

[20] Counsel relied upon *Bank Bumiputra Malaysia Bhd v. Sal Enterprise Sdn Bhd & Ors* [2005] 4 CLJ 277 where it was held "... The said facility was given for specific purposes and the first respondent has to satisfy several conditions before monies under the said facility could be released. The first respondent cannot utilise the monies under the said facility for purposes other than that spelt out in the said letter of offer read together with the said amended letter of offer". With respect, the general statement therein does not necessarily apply for the following reasons. D E

[21] Section 3.1 is MCI's representations and warranties and s. 4.4 is as to purpose of loan. Only cl. 11 is as to events of default specifically. F

[22] Where the submissions run aground is that s. 11.1 begins as follows before proceeding to list the events:

The Bank may, by written notice to the Borrower declare at any time prior to any Drawdown Date that the Commitment shall be cancelled, whereupon the same shall be cancelled or at any time after the Drawdown Date declare the principal amount of the Loan, interest accrued thereon, and all other sums payable under the Loan and this Agreement to be forthwith due and payable, whereupon the same shall become so payable. G H

[23] At the time drawdown was sought of the last tranche, no notice had been issued. Hence, the reliance upon the ground of default is an afterthought, particularly since the officers of the bank had conducted inspection, recommended release of funds, and the payment was approved (see SD4). I

A [24] The High Court correctly directed itself that the role of the bank's Chairman was not the issue and the question was whether the bank was justified in withholding the release of the sixth drawdown of RM3 million, before concluding:

B Given the above, it is highly improbable that the officers who visited the site, verified the claims, recommended payment and approved the payment could have missed the fact that the factory, the very purpose for which the loan is granted, has not been built, if indeed what the defendant is contending now is genuine ie, that the factory has not been built. And what needs to be
C borne in mind is that it is not just one officer who was involved in processing and recommending the release of the loan, but several officers. It is thus inherently improbable that 'pembiayaan disalahguna' was not detected by the officers who conducted the site visit and who recommended the earlier payments. And if
D there was misuse of the funds, then it is probable to expect the recommending and the approving officers to be held accountable, but nothing of that sort happened.

[25] The High Court addressed the departure in the use of the funds, and accepted the explanation outlined in MCI's explanation
E to the Vice President of the bank's new division, the Corporate Client and International Banking (CCIB) Division.

[26] We find no reason to hold there is any error in the reasoning to warrant appellate intervention.

F **Termination Notice Defect**

[27] It was submitted one of the reasons for the judge's justification is that the letter of demand dated 28 April 2010 from the bank's solicitors did not specify the conditions precedent that
G have not been complied with.

[28] We have touched upon this aspect earlier above, as to what the High Court had considered. The point about not specifying which conditions precedent was not fulfilled was mentioned in the
H following context:

I It must be noted that prior to CCIB taking over the approval of the loan, nothing was mentioned about the fact that the plaintiff had failed to fulfil the conditions precedent for the facility. And not until the plaintiff filed this suit on 18.3.2010 that the defendant through its solicitor's letter dated 28.4.2010 terminated the facilities

purportedly pursuant to section 6.2 of the loan agreement. Even then, the defendant failed to specify which of the conditions precedent that the plaintiff has failed to fulfil.

A

The defendant through its solicitor issued a notice to the plaintiff dated 2.6.2010. The notice states that the plaintiff has failed to pay the monthly instalments for the facility. *Vide* the same notice, the RM3 million loan was withdrawn and cancelled and the plaintiff was demanded to pay the sum of RM15,944,642.40, the amount outstanding as at 30.4.2010 with interest which forms the defendant's counterclaim against the plaintiff.

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[29] The point was mentioned but it clearly was not the sole driving force for the decision. The High Court was taking that point along with other facts for an overall view of the circumstances. The approach is not disapproved of in *British & Benningtons Ltd v. NW Cachar Tea Co* [1923] AC 48 HL. We reproduce the passage cited:

C

I do not think that the case, as reported, lays it down that a buyer, who has repudiated a contract for a given reason which fails him, has, therefore, no other opportunity of defence either as to the whole or as to the part, but must fail utterly. If he has repudiated, giving no reasons at all, I suppose all reasons and all defences in the action, partial or complete, would be open to him.

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E

[30] It was clearly a supposition rather than a point decided.

[31] In *Pasuma Pharmacal Corp v. McAlister & Co Ltd* [1964] 1 LNS 131; [1965] 31 MLJ 221 FC, the following observation by Thomson LP in the Federal Court in Singapore shows the necessity of considering the circumstances:

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Now it seems clear that if there was fraud and if it was a breach of and a breach going to the root of the original agreement Pasuma were not in any way prevented from relying on that by the terms of their letter of 20th August which was written at a time when they had grounds for suspicion but for less than certainty that a fraud had been committed.

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[32] The grounds of judgment show a meticulous appreciation of the facts before the findings were made. We find no merit in this third ground.

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A Notice To Remedy

[33] It was submitted that:

- B** 42. The Appellant/Defendant respectfully submits that the Learned Judge has erred in deciding that there was not a single document to show that the Respondent/Plaintiff was reminded or notified of any breach of conditions precedent.

[34] This part of the ground of appeal refers to the following part of the grounds of judgment:

- C** The loan agreement requires the defendant to give 14 days to the plaintiff to rectify any breach. From the evidence, it can be seen that from 30.3.2009 when the notice for the final drawdown was delivered to the defendant until the time when CCIB begins to 'suspect' the project, there was not a single document from the defendant to show that the plaintiff was reminded or notified of any breach of the conditions precedent to the facility or of any terms of the loan agreement.
- D**

- E** Further, the defendant's notice of demand adverted to the fact that the plaintiff failed to pay the Instalments. To recap, none of the defendant's witnesses testified that the plaintiff failed to pay the monthly instalments.

[35] It was submitted that:

- F** 43. It is to be noted that the Appellant/Defendant had, by the letters dated 2/9/2009, 4/9/2009, 9/11/2009, 19/11/2009 and 7/12/2009 requested the Respondent/Plaintiff to furnish documents to determine whether the Respondent/Plaintiff had complied with the original purpose of the Loan Facilities.

- G** 44. In any event, the Appellant/Defendant was contending that the Respondent/Plaintiff had failed to utilize the loan for the purpose as envisaged under the Loan Agreement. This failure by the Respondent/Plaintiff was not capable of being remedied even if the Appellant/Defendant had given the Respondent/Plaintiff 14 days notice to remedy the breach.

- H** [36] It seems quite obvious that notices to provide documents to determine whether MCI had complied with the original purpose of the loan facilities, ie, to determine if MCI had complied, are far different from a notice to rectify which spells out the non-compliance and gives the agreed time to rectify.
- I**

[37] Reading the grounds of judgment, we find the submission to be contrived and out of context. The letters referred to provide no support for the argument they were notices to rectify. A

[38] We considered the argument at para. 44 of the written submissions extracted above. Paragraph 44 makes clear the argument at para. 43 was of little or not merit since the argument is that the breach was not capable of remedy. Taken in the context of the grounds extracted at para. 34 of this judgment, it is clear the High Court was referring to absence of notice before CCIB purported to suspect the project but after the notice for the sixth drawdown was submitted. B C

[39] Since the bank as appellant has failed to demonstrate that the High Court had so erred in law principle fact relied upon or appreciation of facts as to result in an injustice warranting appellate intervention to remedy, we dismissed the appeal against liability. D

Quantum And Appeal On Dismissal Of Counterclaim

[40] In respect of damages, the High Court had ordered the bank to pay to MCI: E

(a) Loss of profits: RM63,902,500;

(b) Interest costs paid to the bank: RM1,090,510,42;

(c) Loss and damages from loss of value of the company: RM16,118,000; F

(d) Interests thereon at 4% from 18 March 2010 to date of full settlement; and G

(e) Costs to be assessed.

[41] The obvious point is that if loss of profits had been recovered, an award for loss of value of the company clearly could be a duplication. The evidence is not clear that it is not. H

[42] In the circumstances, we set aside the orders of damages and order the damages to be assessed.

[43] The bank had counterclaimed for repayment of the loan outstanding in the sum of RM15,944,642.40 as at 30 April 2010. I

A [44] The dispute in this case was the sixth tranche of RM3,000,000. There is no dispute in earlier five tranches which had been paid. To put the matter to rest, the amount should be set off against the damages to be assessed.

B [45] We order each party to bear their own costs and that the deposit be refunded.

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